

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Amendment of 73.202(b)
FM Table of Allotments
(Vale, Oregon)

)
)
) MB Docket No. _____
) RM-_____
)
)
)

To: Office of the Secretary
Attn: Audio Division, Media Bureau

**PETITION FOR RULEMAKING TO DELETE CHANNEL
ALLOTMENT**

United Booking Associates, Inc. (“United”), by its counsel and pursuant to Section 1.401 of the Commission’s rules, hereby files this Petition for Rulemaking requesting that the Commission amend the FM Table of Allotments by deleting the allotment for Channel 288C at Vale, Oregon (the “Vale Allotment”). As demonstrated herein, the existing allotment is unbuildable.

I. BACKGROUND.

In March 2000, New West Broadcasting, Inc. (“New West”) filed a Petition for Rulemaking requesting that Channel 288C be allotted to Vale, Oregon and committing to participate in any auction process to obtain the station.¹ New West represented that the allotment would “meet all rules and requirements of the Commission” and noted that a site restriction would be required to allot Channel 288C to Vale.² In May 2000, the Mass Media Bureau issued

¹ Petition of New West Broadcasting for Rulemaking, RM-9869 (dated Mar. 24, 2000).

² *Id.* at 1.

a Notice of Proposed Rulemaking requesting comments or counterproposals on eight proposals to amend the FM Table of Allotments, including New West's proposal.³ In September 2000, the Mass Media Bureau issued a Report and Order amending the FM Table of Allotments to, among other things, include the Vale Allotment.⁴

In April 2005, the Commission announced that a permit to build the Vale Allotment was one of 173 FM construction permits that would be auctioned in Auction 62.⁵ When it announced minimum opening bids for Auction 62, the permit associated with the Vale Allotment was one of only three permits with a \$200,000 minimum opening bid, the highest minimum price in the auction.⁶ In February 2006, the Commission announced that United was the winning bidder for the Vale Allotment with a net winning bid amount of \$1,280,500.⁷

In March 2006, United filed an application (the "Vale CP Application") for a construction permit to build the Vale Allotment.⁸ Over the subsequent years, United has worked diligently to identify suitable tower sites for the Vale Allotment. At every turn, United encountered substantial challenges, which have been documented at length in United's pleadings in this matter and the numerous updates United has provided to the FCC, each of which is

³ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Jacksonville, Georgia) et al.*, Notice of Proposed Rule Making, 15 FCC Rcd 8964 (MMB 2000).

⁴ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Jacksonville, Georgia) et al.*, Report and Order, 15 FCC Rcd 17321 (MMB 2000).

⁵ *Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005: Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedures for Auction No. 62*, Public Notice, 20 FCC Rcd 7999 (2005) ("Auction 62 Announcement PN").

⁶ *Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005: Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 62*, Public Notice, 20 FCC Rcd 10492, 10538 & 10540 (2005) (Section VI, Attachment A).

⁷ *Auction of FM Broadcast Construction Permits Closes: Winning Bidders Announced for Auction No. 62*, Public Notice, 21 FCC Rcd 1071, 1088 (2006).

⁸ United Booking Associates, Inc., FCC Form 301, Application for Construction Permit for Commercial Broadcast Station, FCC File No. BNPH-20060307BCW (filed Mar. 7, 2006).

incorporated herein by reference. United initially approached the Bureau of Land Management (“BLM”), which controls access to the federal land that represents the majority of potential tower sites. BLM rejected United’s request to lease land in August 2006.⁹ United subsequently explored other sites but continued to face insurmountable problems, including an Federal Aviation Administration determination of hazard for one site, continued resistance from BLM, objections from state authorities, and issues with securing power at the proposed site.¹⁰ Thus, United was not able to secure an antenna structure registration number or complete environmental review for a tower on which the Vale Allotment could be built.

In December 2010, Audio Division staff indicated by letter that United’s construction permit application was subject to dismissal unless United, within 30 days, filed an amendment that either (i) provided an antenna structure registration number and certified compliance with the Environmental Protection Act, or (ii) propose to relocate to an existing, registered tower site that did not require further environmental analysis.¹¹ Although United was unable to make the requested amendment, it provided two status updates to Audio Division staff regarding its continuing efforts to secure a site.¹² Nevertheless, by letter dated May 13, 2011, the Audio

⁹ Letter from Pat Ryan, Manager, Malheur Field Office, Bureau of Land Management, to James McNeil, United Booking Associates, Inc., Ref. No. 2860-01 (Aug. 16, 2006).

¹⁰ See United Booking Associates, Inc., Petition for Reconsideration, FCC File No. BNPH-20060307BCW (filed June 13, 2011) (“Petition”); United Booking Associates, Inc., Supplement to Petition for Reconsideration, FCC File No. BNPH-20060307BCW (filed Aug. 22, 2012) (“Supplement”). Copies of the Petition and Supplement are attached hereto as Exhibit D.

¹¹ Letter from Edna V. Prado, Supervisory Engineer, Audio Division, Federal Communications Commission, to United Booking Associates, Inc., FCC File No. BNPH-20060307BCW, at 2 (Dec. 6, 2010).

¹² See Petition at 3.

Division dismissed United's construction permit application for failure to prosecute.¹³ United timely sought reconsideration of the decision.¹⁴

In October 2017, the Audio Division granted United's 2011 Petition for Reconsideration and reinstated the Vale CP Application.¹⁵ In reinstating United's application, the staff determined that "[a]lthough United's efforts have been time-consuming and unsuccessful to date, it has in fact made efforts, and moreover has documented the extent of those efforts and communicated them to the staff."¹⁶ The staff's letter conceded that "United's five-year search for a suitable site near the allotment coordinates . . . suggests that its pursuit of full Class C facilities that can be timely constructed without further unforeseen difficulties is unlikely to bear fruit."¹⁷ The Reinstatement Letter ordered United to amend its pending application to specify "a legally and technically acceptable and grantable transmitter site" within twelve months.¹⁸

II. THE VALE ALLOTMENT IS UNBUILDABLE AND SHOULD BE DELETED.

As Audio Division staff have conceded, the Vale Allotment cannot be built and, thus, it should be removed from the FM Table of Allotments.

The Commission disfavors allotments that cannot be constructed and licensed absent waiver of the Commission's rules. For example, the Commission has a "long-standing policy . . . not to allot or retain a channel where there is no site that would meet FAA criteria and the

¹³ Letter from James D. Bradshaw, Deputy Chief, Audio Division, Federal Communications Commission, to United Booking Associates, Inc., FCC File No. BNPH-20060307BCW, at 3 (May 13, 2011).

¹⁴ See Petition and Supplement, *supra* n.10.

¹⁵ Letter from Peter H. Doyle, Chief, Audio Division, Federal Communications Commission, to Barry A. Friedman, Counsel to United Booking Associates, Inc., FCC File No. BNPH-20060307BCW, at 4 (Oct. 5, 2017). ("Reinstatement Letter").

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 3.

¹⁸ *Id.*

Commission's spacing requirements.”¹⁹ Discussing an instance in which an allotment appeared to be unbuildable because no transmitter site was available which would comply with both the Commission's mileage separation and city coverage requirements, the Commission explained that

[i]n the usual case or even one where additional assurance was required, it sometimes happens that a site thought to be available turns out not to be. As a result, the applicant for use of the channel may be forced to specify another site, even one not meeting spacing requirements. This does not cast doubt on the underlying assignment if there had been a reasonable basis for believing a site was available. However, if this were not the case, the assignment rested on a false premise and should be deleted. . . . Such reasonable availability is the premise on which any assignment must result, and without it we must conclude that this assignment was erroneously made.²⁰

The FCC has initiated a rulemaking on its own motion to delete an allotment as a result of difficulties encountered by the permittee “in overcoming objections raised by the [FAA] to the activation of this allotment.”²¹ In that case, the permittee (a successful bidder for the permit in Auction 37) faced problems “too substantial to permit the construction and operation” of a new station and the Commission subsequently delete the unbuildable allotment.²² And in 2000 the Audio Division denied three separate requests to add allotments to serve western Idaho communities near Vale due to BLM resistance to the proposals.²³ In each case, BLM advised

¹⁹ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Pacific Junction, Iowa)*, Report and Order, 25 FCC Rcd 16253, 16254 ¶ 4 (MB 2010) (“*Pacific Junction R&O*”) (citing *La Fayette, Georgia*, Report and Order, 13 FCC Rcd 2093 (MMB 1998)).

²⁰ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Pinckneyville, Illinois)*, Report and Order, 41 RR 2d 69, 71-72 ¶¶ 9-10 (BB 1977).

²¹ *Pacific Junction R&O*, 25 FCC Rcd at 16253 ¶ 2 (citation omitted).

²² *Id.* at 16253-54 ¶ 2.

²³ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Kuna, Idaho)*, Report and Order, 15 FCC Rcd 4976 (MMB 2000) (“*Kuna R&O*”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Grand View, Idaho)*, Report and Order, 15 FCC Rcd 2768 (MMB 2000) (“*Grand View R&O*”); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Melba, Idaho)*, Report and Order, 15 FCC Rcd 4435 (MMB 2000) (“*Melba R&O*”).

that providing electricity to the proposed sites would be cost-prohibitive and that environmental studies were a prerequisite to considering a tower on BLM land.²⁴ In one case, the difficulty of building on BLM land was a sufficient basis for the staff to conclude that it would not serve the public interest to create the requested allotment.²⁵ These decisions, dealing with allotment proposals in the same area as the Vale allotment, are instructive as to the ability to construct a station on the allotted channel serving Vale.

The Vale Allotment cannot be constructed and licensed. Although the Vale CP Application was reinstated *nunc pro tunc*, the insurmountable challenges that United faced in securing a site for the proposed facility remain. As set forth in Exhibit A hereto, the area in which a fully-spaced facility could be located to construct the Vale Allotment (the “Area to Locate”) is small, and only a small portion that area reflects a location in which a 200 foot tower would enjoy line-of-sight to Vale, Oregon to enable sufficient city-grade coverage. Of the technically-feasible locations, the vast majority are located on federal lands controlled by the BLM, which from the outset has indicated its opposition to the construction of a communications tower in the area. With respect to those areas of private land that lie within the Area to Locate, many can only be accessed by means of BLM land, access easements which BLM has not been willing to grant.

Much of BLM’s resistance is due to the potential impact of a communications tower on the mating areas of the greater sage grouse, the largest grouse in North America and a species that, while threatened, is precluded by Federal law from being designated an Endangered Species. As set forth in Exhibit A, a number of sage grouse mating areas (or “leks”) are located

²⁴ *Kuna R&O*, 15 FCC Rcd at 4977 ¶ 4; *Grand View R&O*, 15 FCC Rcd at 2768 ¶ 3; *Melba R&O*, 15 FCC Rcd at 4436 ¶ 4.

²⁵ *Grand View R&O*, 15 FCC Rcd at 2768 ¶ 4.

in the Area to Locate, and the BLM has determined that it will not permit any communications tower construction (or the installation of power lines) within 2 miles of a sage grouse lek. United was not advised of the problematic lek locations by BLM until after it submitted its proposal. There is little reason to believe that BLM might reverse course – to the contrary, after BLM approved a wind energy project in nearby Harney County, Oregon, the United States Court of Appeals for the Ninth Circuit ruled that the project must be halted until BLM adequately studied its potential impact on sage grouse habitats.²⁶

United's difficulties in attempting to construct a facility in this area are not unique. As set forth in Exhibit B, subsequent to the end of Auction 62 efforts to build at least three FM stations have been abandoned and station call signs deleted, presumably due to impediments similar to those faced by United. In light of the demonstrated impediments faced by United in building the Vale Allotment and by others in building FM facilities nearby, the FCC should conclude that the Vale Allotment was erroneously made and delete it from the FM Table of Allotments.

III. UNITED MADE A PROLONGED GOOD FAITH EFFORT TO BUILD THE VALE ALLOTMENT.

United's prolonged, diligent, and costly efforts to secure a transmitter site for the Vale Allotment demonstrate that (as the Audio Division concluded) it has not failed to prosecute the Vale CP Application. Instead, United has engaged in an "active pursuit of a transmitter site" but has faced "various circumstances beyond its control."²⁷ Each of the difficulties United encountered resulted from difficulties particular to the unique challenges surrounding the Vale Allotment. Indeed, United's consistent efforts underscore the sincerity of its winning bid and of its unsuccessful efforts toward initiating service to Vale.

²⁶ *Oregon Natural Desert Association v. Jewell*, 823 F.3d 1258 (9th Cir. 2016).

²⁷ Reinstatement Letter at 3.

In addition to the expense of the more than quarter-million dollar down payment it made in connection with Auction 62, United has spent more than \$154,000.00 on its unsuccessful efforts to build the Vale Allotment. A conservative estimate of United's costs in this regard is attached hereto in Exhibit C. United's team has worked diligently for years to build the Vale Allotment without success. Thus, after substantial time and expense, United has reluctantly reached the same conclusion as did the Audio Division: its efforts to build the Vale Allotment in a timely fashion are "unlikely to bear fruit."

United is not filing this Petition as a result of "buyer's remorse" for its winning bid in Auction 62. To the contrary, United has no intention of seeking a refund the down payment it made in connection with that bid. United notes that the minimum opening bid amounts for Auction 62 were set based on, among other things, the class of facility involved and the predicted population that would be covered by the proposed FM broadcast facility.²⁸ United's opening bid (and, of course, its winning bid) was based on the fact that the Vale Allotment represents a Class C FM facility with the potential population coverage commensurate with that status. When it reinstated the Vale CP Application, the staff "strongly urge[d]" United to consider "solutions" such as "modification of station class" that might address the problems inherent to the Class C Vale Allotment.²⁹ But United was the winning bidder for a Class C – not Class A – facility. If a Class A facility at Vale would serve the public interest, it can be requested by an interested party and allotted in a subsequent proceeding. But United bid on a full Class C allotment and, as such

²⁸ Auction 62 Announcement PN, 20 FCC Rcd at 8004.

²⁹ Reinstatement Letter at 3.

an allotment cannot be built, that allotment should not be retained in the Commission's Table of Allotments.³⁰

Because the same challenges United has encountered attempting to build a Class C facility at Vale would prevent any other permittee from successfully constructing facilities associated with the Vale Allotment, the Commission should delete it from the FM Table of Allotments.

IV. CONCLUSION.

For the reasons set forth herein, the Commission should issue a Notice of Proposed Rulemaking proposing the deletion of Channel 288C at Vale, Oregon.

Respectfully submitted,

UNITED BOOKING ASSOCIATES, INC.

By:


David D. Oxenford
Derek Teslik

Wilkinson Barker Knauer, LLP
1800 M Street, NW Suite 800N
Washington, DC 20036
202.783.4141

Counsel to United Booking Associates, Inc.

June 5, 2018

³⁰ While United is not seeking a refund of the down payment made in connection with its bid for this channel, it notes that, should the channel be re-auctioned in the future and purchased at a price below what United bid, it would be liable for the difference in what it bid and what some future applicant paid. As shown in this Petition and in its exhibits, the Class C allotment for which United paid cannot be built. Thus, United recognizes that, if the channel is deleted, it would not be re-auctioned so no deficiency would ever be imposed. Given the costs already incurred in its efforts to build this channel, costs that will be forfeited by United, it has suffered enough and should not be further penalized should some uninformed party bid a minimal amount in any re-auction of the channel. Instead, as the channel cannot be built, it must be deleted so that no re-auction will ever occur.




Exhibit A

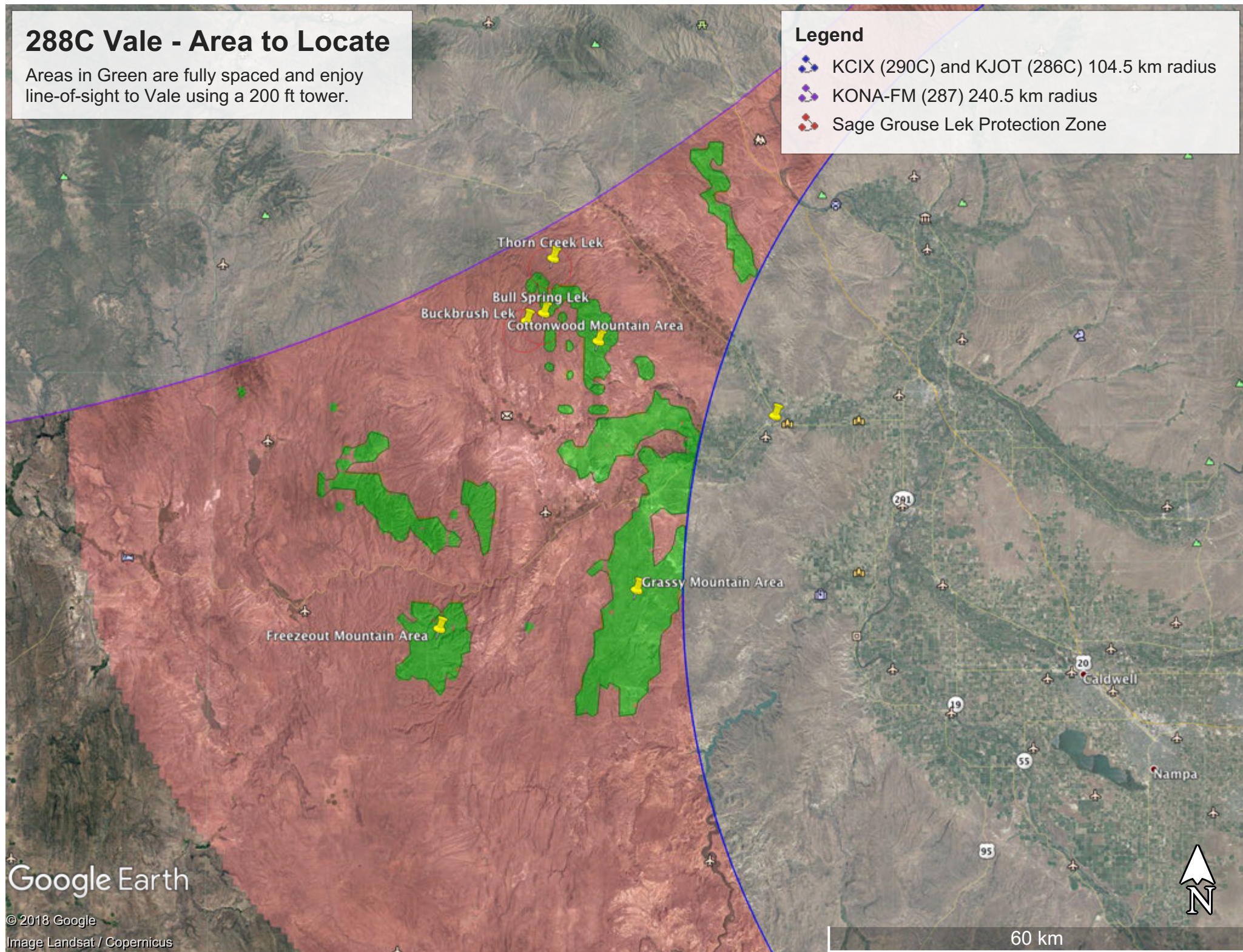
Area to Locate Maps

288C Vale - Area to Locate

Areas in Green are fully spaced and enjoy line-of-sight to Vale using a 200 ft tower.

Legend

-  KCIX (290C) and KJOT (286C) 104.5 km radius
-  KONA-FM (287) 240.5 km radius
-  Sage Grouse Lek Protection Zone



Google Earth




© 2018 Google
Image Landsat / Copernicus

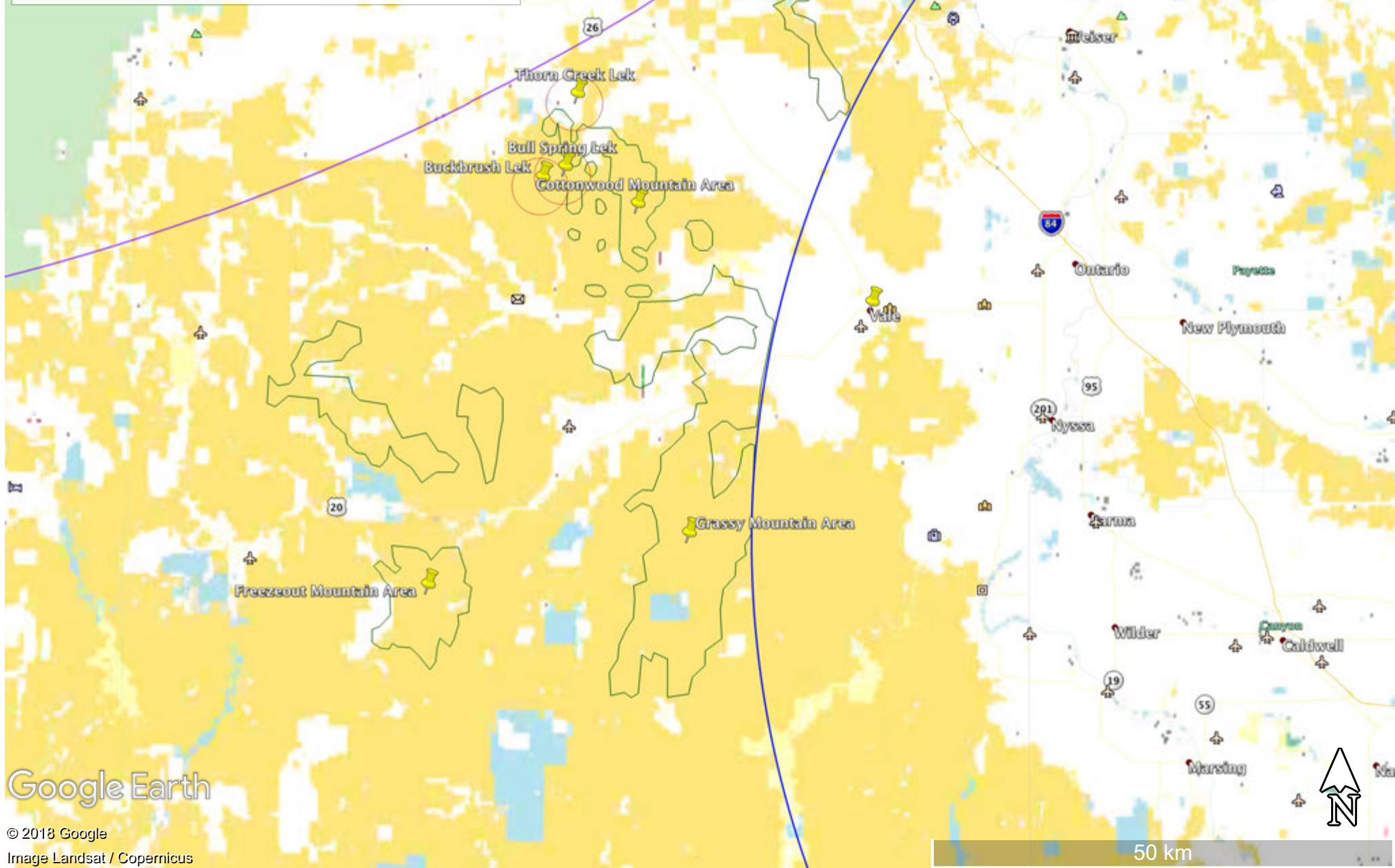
288C Vale - Area to Locate

Areas in outlined in green are fully spaced and enjoy line-of-sight to Vale using a 200 ft tower.

Yellow Areas are BLM land.
White Areas are Private land.

Legend

-  KCIX (290C) and KJOT (286C) 104.5 km radius
-  KONA-FM (287) 240.5 km radius
-  Sage Grouse Lek Protection Zone






288C Vale - Area to Locate

Areas in outlined in green are fully spaced and enjoy line-of-sight to Vale using a 200 ft tower.

Yellow Areas are BLM land.
White Areas are Private land.

Legend

-  KCIX (290C) and KJOT (286C) 104.5 km radius
-  KONA-FM (287) 240.5 km radius
-  Sage Grouse Lek Protection Zone

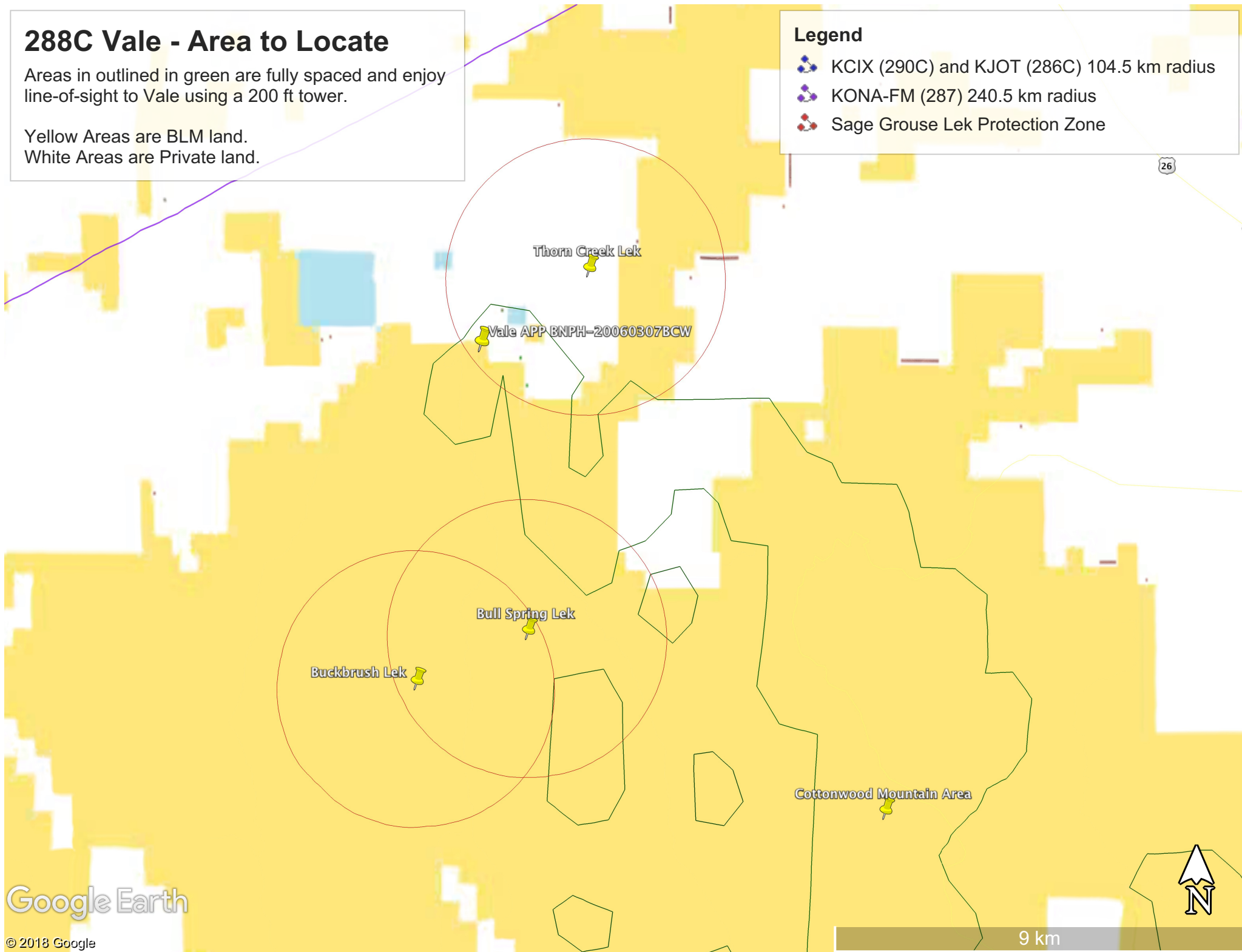


Exhibit B

Abandoned Efforts to Build Near Vale

Unbuildable Stations
(Since Auction 62)

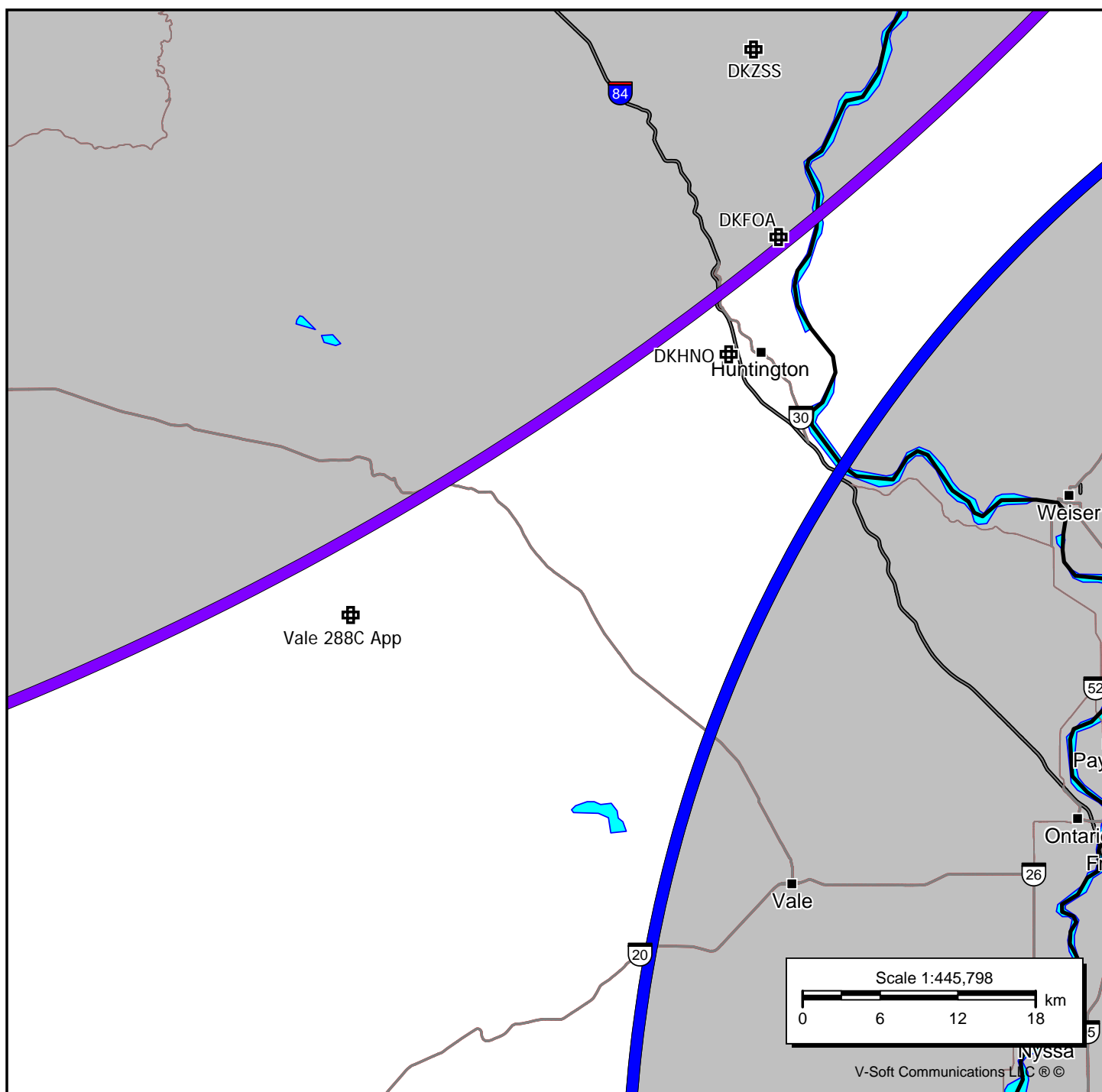


Exhibit C

Expenses Incurred Trying to Build Vale Allotment

Ace Radio, LLC United Booking Associates Radio Station Expenses

Company Paid From	Date	Num	Name	Memo	Amount
Untied Booking Assoc	03/31/2008	1013	Jones, Waldo, Holbrook & McDonough		13,147.33
Untied Booking Assoc	11/29/2007	1009	Compass Land Surveying		11,313.50
Untied Booking Assoc	01/27/2009	4429	Sagebrush Cosultants, LLC		10,461.80
Untied Booking Assoc	02/23/2007	1004	Jones, Waldo, Holbrook & McDonough		10,000.00
Untied Booking Assoc	01/27/2009	4428	Compass Land Surveying		10,000.00
Untied Booking Assoc	03/01/2007	1005	Jones, Waldo, Holbrook & McDonough		9,144.30
Untied Booking Assoc	02/23/2007	4348	Thompson Hine		6,013.67
Untied Booking Assoc	01/27/2009	4430	Spanish Peaks Broadcasting, Inc.		5,459.97
Untied Booking Assoc	04/02/2007	1006	Spanish Peaks Broadcasting		4,039.00
Untied Booking Assoc	02/23/2007	1002	Idaho Power		3,520.00
Untied Booking Assoc	05/14/2008	1014	Compass Land Surveying		2,930.00
Untied Booking Assoc	09/19/2011	4506	Thompson Hine		2,908.00
Untied Booking Assoc	11/09/2011	4510	Thompson Hine		2,784.35
Untied Booking Assoc	03/12/2012	4525	Thompson Hine		2,691.92
Untied Booking Assoc	08/22/2006	4296	Spanish Peaks Broadcasting, Inc.	Engineering Fees	2,682.82
Untied Booking Assoc	05/14/2008	1015	Spanish Peaks Broadcasting		2,245.31
Untied Booking Assoc	12/05/2007	1010	Spanish Peaks Broadcasting		2,237.92
Untied Booking Assoc	09/12/2007	1008	Thompson Hine		2,180.75
Untied Booking Assoc	12/05/2012	4563	Thompson Hine		2,145.00
Untied Booking Assoc	02/23/2007	1001	Treasure Valley Engineers		2,103.70
Untied Booking Assoc	08/11/2009	4437	Thompson Hine		1,919.98
Untied Booking Assoc	09/12/2007	1007	Spanish Peaks Broadcasting		1,801.69
Untied Booking Assoc	05/14/2008	1016	Thompson Hine		1,536.20
Untied Booking Assoc	03/08/2011	4489	Thompson Hine		1,504.00
Untied Booking Assoc	02/23/2007	4349	Spanish Peaks Broadcasting, Inc.		959.23
Untied Booking Assoc	12/05/2007	1011	Thompson Hine		915.90
Untied Booking Assoc	12/11/2012	4564	Media Services Group		850.00
Untied Booking Assoc	03/31/2008	4394	Jones Waldo Holbrook & McDonough		575.00
Untied Booking Assoc	08/29/2007	4373	Thompson Hine	FCC Auction	388.90
Untied Booking Assoc	02/23/2007	1003	Jones, Waldo, Holbrook & McDonough		331.40
Ace Radio LLC	01/11/2008	1012	State of Utah		22.00
Ace Radio LLC	06/28/2006		Ampco Parking	Parking	19.00
Ace Radio LLC	07/05/2006		Ampco Parking	Parking	31.00
Ace Radio LLC	06/28/2006		Chevron	Fuel	35.87
Ace Radio LLC	04/15/2006	1421990	Jones Waldo Holbrook & McDonough	15098.0004	76.20
Ace Radio LLC	06/28/2006		Avis	Car Rental - Boise I	127.01
Untied Booking Assoc	07/01/2006		Vons	Groceries	182.50
Ace Radio LLC	04/15/2006	1421993	Jones Waldo Holbrook & McDonough	Radio Station Orgar	441.20
Untied Booking Assoc	02/07/2006	02.07.06	Mario Hieb	Travel	490.85
Untied Booking Assoc	11/14/2006	1430451	Jones Waldo Holbrook & McDonough		634.20
Untied Booking Assoc	09/15/2006	1427759	Jones Waldo Holbrook & McDonough	Aug 16 - Sept 16	732.19
Untied Booking Assoc	10/15/2006	1429151	Jones Waldo Holbrook & McDonough	15000.0001	898.90
Untied Booking Assoc	02/13/2007	186	Spanish Peaks Broadcasting, Inc.	Travel expense	959.23
Untied Booking Assoc	08/16/2006	1426582	Jones Waldo Holbrook & McDonough	Radio Station-Legal	965.60
Ace Radio LLC	06/15/2006	1423999	Jones Waldo Holbrook & McDonough	Radio Station 5/16-6	1,433.40

Ace Radio, LLC United Booking Associates Radio Station Expenses

Company Paid From	Date	Num	Name	Memo	Amount
Ace Radio LLC	04/25/2006	2156563	Thompson Hine		1,584.50
Ace Radio LLC	05/15/2006	1422854	Jones Waldo Holbrook & McDonough	Radio Station	1,635.00
Ace Radio LLC	08/28/2006	1424942	Jones Waldo Holbrook & McDonough	Station Organizatio	1,662.40
Ace Radio LLC	05/15/2006	1422865	Jones Waldo Holbrook & McDonough	15098.0003	2,000.80
Ace Radio LLC	07/20/2006	2170214	Thompson Hine	Legal Advise	2,250.95
Ace Radio LLC	08/28/2006	2175453	Thompson Hine	Legal advise	2,409.62
Ace Radio LLC	07/02/2006	144	Spanish Peaks Broadcasting, Inc.	Group Engineering I	2,682.82
Ace Radio LLC	01/27/2009	314	Compass Land Surveying		14,600.00
					<hr/> 154,666.88

Exhibit D

2011 Petition for Reconsideration
and
2012 Supplement to Petition for Reconsideration

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

STAMP & RETURN

In re Application of)

United Booking Associates, Inc.)

For Construction Permit)

For New FM Station, Vale, Oregon)

File No. BNPH-20060307BCW

Facility ID No. 166084

FILED/ACCEPTED

To: Secretary, Federal Communications Commission

Attn: The Chief, Media Bureau

JUN 13 2011

Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION

United Booking Associates, Inc. ("United"), applicant for a new FM Station at Vale, Oregon, Facility ID No. 166084 ("Vale Station") via successful bid in FM Auction No. 62, by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby files this Petition for Reconsideration of the Commission's recent decision dismissing the above-referenced application for a construction permit ("Application") on grounds that United failed to prosecute the Application ("Letter Ruling").¹ The Letter Ruling is without basis in fact or law and must therefore be reversed. In support thereof, United states as follows.

In the Letter Ruling, the Media Bureau cites United's continuing struggle to secure a transmitter site that satisfies FAA and environmental requirements as grounds for dismissal of United's Vale Station Application, concluding that United's difficulties reflect the inadequacy of United's efforts. *See* Letter Ruling at 2-3. The Bureau's decision to dismiss the Application mischaracterizes United's conduct and holds United to a vague and unspecified legal standard

¹ *See Letter* to United Booking Associates, Inc. from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, dated May 13, 2011. This Reconsideration is timely filed within 30 days of the issue date of the public notice of the dismissal action, as required by Section 1.106(f) of the Commission's Rules. *Public Notice*, Report No. 47489, released May 18, 2011.

that bears little resemblance to the "failure to prosecute" standard previously established by the Commission and the DC Circuit Court and left neither mentioned nor discussed in the Letter Ruling. First, United discusses the "failure to prosecute" standard developed by the Commission and the DC Circuit Court and then turns to the facts of the instant case. On the basis of the legal standard and the application of the facts to it, the instant Petition should be granted.

Pursuant to Section 73.3568(a)(1) of the Commission's Rules, the Commission may dismiss an application based upon a failure to prosecute the application.² However, that authority is not absolute; exercise of such powers must be reasonable, not arbitrary and capricious.³ The Commission itself has set reasonable limits on its own power to dismiss applications for failure to prosecute. In *The Dunlin Group*, 6 FCC Rcd. 4642, 4644 (Rev. Bd. 1991), the Commission recognized that dismissal for failure to prosecute may be appropriate in certain egregious scenarios such as "open defiance of an order demanding the production of a witness," or when there has been a "pattern of dilatory, disruptive, or recalcitrant conduct so sharply out of order as to absolutely compel dismissal," but cautioned that "dismissal is an extreme remedy to be employed when an applicant's conduct is so disruptive, contemptuous, or prejudicial that no lesser measure will reasonably protect the proceedings." *Id.* at 4643 (citing *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989)).

Moreover, the DC Circuit Court has endorsed the *Dunlin Group* standard, holding that an applicant should not be subject to dismissal of its application unless "with contempt or

² "Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal." 47 CFR § 73.3568(a)(1).

³ See 5 USC § 706(2)(a) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

inexcusable sloth, [it] plainly defies an order." *Innovative Women's Media Association v. FCC*, 16 F. 3d 1287, 1289 (D.C. Cir. 1994) (citing *Dunlin Group*, 6 FCC Rcd. at 4644). For example, in *Innovative Women's Media Association*, while the Commission determined that a series of delays and disruptions amounted to a failure to prosecute and dismissed the applicant's application, the DC Circuit Court reversed, finding the Commission's action arbitrary and capricious as the delays and disruptions existed side-by-side with applicant's "consistent effort... in the face of considerable obstacles." *Id.* at 1290. According to the Court, the Commission erred by "treating the delay and disruption...as the sort of inexcusable or contumacious behavior warranting dismissal for failure to prosecute." *Id.*

The Media Bureau has made a similar error in the instant proceeding, either improperly treating United's unobjectionable conduct as "inexcusable or contumacious behavior warranting dismissal," or impermissibly reinterpreting the Commission's "failure to prosecute" standard to apply to the instant matter – or both. As the record in this case demonstrates, United continues to experience delay and disruption with the Vale Station Application, despite United's "consistent effort... in the face of considerable obstacles." As discussed below, since 2006, United has submitted a steady stream of correspondence to the Commission documenting its efforts to find a suitable transmitter site and the obstacles it has encountered. Most recently, United submitted a letter on January 5, 2011, and an extensive and detailed supplement thereto on March 14, 2011, setting forth the problems it has incurred with the Bureau of Land Management of the United States Department of the Interior ("BLM"), the Oregon Department of Fish and Wildlife and private landowners, in securing a transmitter site and access to that site for power to operate the Station's transmission system. United's submissions evidences the fact that the difficulties it has experienced advancing the Vale Station Application are not the result of "sloth" or "contempt"

for Commission procedure. In dismissing United's Application, the Media Bureau ignored the controlling legal standard as well as evidence on the record, both independent grounds for reversal. *See Western Union Telegraph Company*, 95 FCC 2d 881, 920 (1983) (setting aside decision that “ignored record evidence relevant to the issues designated for investigation and lacked sufficient analytical foundation for the findings reached”); *Innovative Women's Media Association*, *supra* .

As the record in this case demonstrates, contrary to the assumptions made in the Letter Ruling, United has neither failed to prosecute its application nor failed to keep the Commission apprised of its actions. Throughout this proceeding, United has worked with due care to secure the necessary approvals, file all required notifications with the Commission, and promptly respond to all Commission inquiries. As highlighted by the Media Bureau, United has been unable to complete certification of environmental compliance for the Vale Station. United would very much like to satisfy its certification obligations along with the Media Bureau, but, to date, it has not been in a position to do so without misrepresenting the environmental situation at the proposed transmitter site.

United wishes to take this opportunity to repeat the facts it has previously presented to the Commission in its various submissions. The Southeastern portion of the State of Oregon is portion of this country where the typography is high desert, the population is small and dispersed among a few communities, including Vale, and where much of the land is owned and administered by government agencies. It is in no manner similar to the East Coast or urban America, where property is laid out in grids, construction has occurred, and property records are well maintained. In the simplest of terms, Eastern Oregon is a location where little has changed

over decades and where any form of development, especially in a mountain location and where the proposed construction involves a radio station tower, is both slow and difficult

United's efforts to construct a new tower in this region have been fraught with difficulties. As United has previously advised the Commission, while United has located a parcel of private property on which to construct its tower, that parcel does not come with road or power line access. In order to obtain such access, United has to obtain the approval of approval of private and public landowners. The adjacent public lands are administered by the BLM, and United has to seek an easement from the BLM. Just as the Commission performs its environmental assessment, so does the BLM before it will provide United with the necessary easement.

United has been working with the BLM to secure the completion of the environmental assessment. However, it has been unable to achieve a result owing to a number of problems both large and small. Perhaps the most difficult issues have been the ownership of the land involved and the protection of endangered species. Owing to the absence of local residents and housing, the proposed transmitter site has not been surveyed in quite some time and must be surveyed to determine the boundaries of the local land owners. Even where parcels can be delineated, land ownership of parcels often cannot be determined. United has found that the land ownership records are not up to date and, in a number of situations, the last recorded owner is deceased, unknown, or unavailable, and there is almost no means to determine or locate, who the current owners are so that easement rights can be secured. Likewise, the BLM is not prepared to take any action until United can delineate the specifics of the easement it needs for power lines or whether United will have to use BLM roads that currently do not permit the passage of fuel

delivery trucks that would be needed if United were to generate its own power at its transmitter site.

Despite these concerns, United has not ignored its responsibility to prosecute the application. It has retained the services of a consulting engineer, Kevin Terry, made the arrangements for the leasing of a transmitter site itself, worked with the BLM, and undertaken work to establish parcel boundaries, obtain information as to landowners, and secure approvals. United does not know of any means that it could have adopted which would have expedited the process beyond what it has done already. United has expended extensive amounts of time, effort and money prosecuting its Application, resources United continues to devote toward the Vale Station.⁴

In sum, the Letter Ruling is in error as a matter of both fact and law, as it both mischaracterizes United's efforts to prosecute the Vale Station Application and misinterprets the legal standard applicable in the instant matter. With more time, United is confident that it can either achieve the necessary approvals at the currently proposed site or find a suitable transmitter site meeting environmental requirements and secure grant of its Application. Taking into

⁴ United's actions have been far greater than other applicants who have not been called out for failing to prosecute. For example, the Commission should consider the case of Able Radio Corporation ("Able"), the applicant for a new FM radio station at Tonopah, Arizona in File No. BNPH-20070403ACO. In Able's case, the record is clear that for over two and one-half years – until an objector brought the situation to the Commission's attention – Able had an application pending for a site that was located within a federally-protected wilderness area, where a tower could never be built for any reason whatsoever. During that entire period, there was no evidence that the applicant or its agents had ever been to the transmitter site, talked with the BLM, or undertook the process of negotiating a lease with the BLM. Once the objector brought this to the FCC's attention, Able amended its application to a new site. Despite this, the Commission has not sought to dismiss Able's application. Unlike Able, United has not ignored its transmitter site and has done all it can to secure the necessary approvals from the BLM. The problem is that the process, owing to the unique issues related to seek approval of a site in a desolate part of Eastern Oregon, just doesn't happen as expeditiously as United or the Commission desires.

consideration the relevant facts and United's ongoing efforts to secure approval from the BLM, United submits that it would be arbitrary and capricious, and in violation of precedent, for the Commission to dismiss the Vale Station Application. Instead, the Commission should retain the Application in good standing and work with United as United seeks to achieve approval from the BLM and other relevant federal, state and local agencies. The Commission has to recognize that in certain parts of this country it is not easy to obtain the necessary local and federal permitting and that such problems should not be deemed failures to prosecute.

WHEREFORE, United Booking Associates, Inc. respectfully requests that the Commission reverse the Media Bureau's decision dismissing United's application for a construction permit for a new FM Station at Vale, Oregon and grant United more time to resolve the environmental issues surrounding its efforts to construct the Vale Station.

Respectfully submitted,

UNITED BOOKING ASSOCIATES, INC.

By: 

Barry A. Friedman
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: June 13, 2011

CERTIFICATE OF SERVICE

I, Barry A. Friedman, hereby certify that I have served on this 13th day of June, 2011, a copy of the foregoing **PETITION FOR RECONSIDERATION** on the following party by first-class mail, postage pre-paid:

Mr. James D. Bradshaw*
Audio Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

A handwritten signature in black ink, consisting of a stylized 'B' followed by a horizontal line.

Barry A. Friedman

*By Hand

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Application of)	
)	
United Booking Associates, Inc.)	File No. BNPH-20060307BCW
)	
For Construction Permit)	Facility ID No. 166084
For New FM Station, Vale, Oregon)	
)	

To: Secretary, Federal Communications Commission
Attn: The Chief, Audio Division, Media Bureau

**SUPPLEMENT TO
PETITION FOR RECONSIDERATION**

United Booking Associates, Inc. ("United"), applicant for a new FM Station at Vale, Oregon, Facility ID No. 166084 ("Vale Station") via successful bid in FM Auction No. 62, by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby files this Supplement to its June 13, 2011 Petition for Reconsideration of the Commission's decision dismissing the above-referenced application for a construction permit ("Application") on grounds that United failed to prosecute the Application ("Letter Ruling").¹ In support thereof, United states as follows.

By this Supplement, United seeks to respond to the request from the staff of the Media Bureau for information concerning the following issues related to its efforts to secure a transmitter site that complies with FCC requirements, including those of the National Environmental Policy Act of 1969: the status of United's efforts to secure a transmitter site, as

¹ See *Letter* to United Booking Associates, Inc. from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, dated May 13, 2011. While Section 1.106(f) of the Commission's rules prohibits the filing of supplements to petitions for reconsideration without leave granted to do so, United is submitting this Supplement in response to a request to do so made by the staff of the Commission's Media Bureau. United submits that complying with such a request is a sufficient basis for the consideration of this Supplement.

of the time that the Commission, on December 6, 2010, advised that it intended to dismiss United's Application, what requests with government agencies United had in place, who United was dealing with at government agencies, and other relevant considerations.

Initially, United wishes to remind the Commission of the unique considerations facing any party wishing to construct a new tower in Oregon and especially in rural eastern Oregon, where Vale is located. First, a significant portion of the land base of Oregon consists of public lands, primarily federal lands.² Second, the topography of the land is such that it is not generally useful for a transmitter site. The Bureau of Land Management ("BLM") describes the federal lands in eastern Oregon in the following manner³:

The public land found in eastern Oregon is characterized by large swaths of basin and range topography. These dramatic, semi-arid...landscapes provide a wide variety of recreation and commercial opportunities while also proving habitat for a diverse array of fish and wildlife species.

Third, the BLM is engaged in protecting the endangered sage-grouse, which is native to eastern Oregon, further limiting land available for rights-of-way, such as transmitter sites. Finally, owing to the rural nature of eastern Oregon, survey and public land records are poorly organized and maintained and it is often difficult to determine if there is an owner attached to a particular parcel of property and who that owner might be. For example, some surveys date back two centuries and their validity, in an era well before modern surveying tools is questionable and where generations have passed since the last deed was recorded, it is near impossible to

² Of Oregon's approximately 61 million land acres, the Federal Bureau of Land Management manages approximately 15.7 million acres. <http://www.blm.gov/or/socioeconomic/>. Other government agencies manage a similar amount, giving the federal government an approximately 50% ownership interest in Oregon land, especially in rural areas. <http://www.ohs.org/the-oregon-history-project/narratives/this-land-oregon/people-politics-environment-1945/oregons-public-lands.cfm>

³ <https://www.facebook.com/BLMOregon/info>

determine who the current owners are and, absent such information, the acquisition or lease of such lands are a nearly impossible task.

All of these factors confronted United as it sought to locate its transmitter site. United initiated the process in the typical manner any broadcaster would. It located the logical sites for a transmitter location, usually at the highest available spots, and approached the landowner. Of course, in this instance, the landowner was the BLM. After considering United's request, the BLM, acting on August 16, 2006, denied United's request (Exhibit A).⁴

United was not deterred by the BLM's action. Instead of using public land, United was determined to make use of private land. Following the BLM's rejection action, United undertook a review of high elevation private lands. As part of this review, United sought to locate such lands that would enable it to construct access, for a road and power lines, over private land or with as little need to access public land as possible.

United's efforts to secure private land have been described by Kevin Terry, its engineering consultant. A copy of Mr. Terry's March 9, 2011 Statement is appended hereto as Exhibit B. Mr. Terry reported, in his Statement, that from 2007 to 2009, United has worked on several available sites. These included public and private land, and involved discussions with private landowners, public officials, public utilities and efforts to delineate easements over lands that may have never been surveyed such that the ownership is not known.

Between 2009 and the time of the Bureau's action to dismiss the construction permit, United's principal remained in contact with the local ranchers who own the land that would constitute the transmitter site and access routes. These contacts were intended to let the ranchers

⁴ United wishes to note that the BLM's suggestion that United make use of the Owyhee Ridge communications site was not a feasible alternative for United. A transmitter site at that location would not comply with the applicable provisions of Subpart B of Part 73 of the Commission's Rules.

know that United wished to lease or acquire their land for the radio station transmitter site.

During visits to Oregon, United's principal also consulted with Interior Department personnel.

Despite the Bureau's action, United has not ignored its responsibility to prosecute the Application. Through Mr. Terry, United has continued to review its options and remains hopeful that arrangements can be made for the Cottonwood Mountain site to be a workable one. There are two options that United wishes to pursue. One would be to arrange for the BLM to permit fuel deliveries to the site using the existing road, or to allow for a protected fuel storage arrangement that would limit the number of deliveries. The other would be to attempt to gain the approval of the existing landowners, including new ones, to an easement whereby a power line could be constructed to the Munsterman property, where United had negotiated a land use arrangement.

United has not, in the recent period, pursued these efforts owing to the uncertainty as to whether it has a valid, pending Application, following the Commission's dismissal action. It does not believe that it is in a position to make commitments to government agencies if it does not have a valid Application pending and does not wish to expend funds on consultants, contracts and easements if it will not be able to secure a permit.

United is prepared, once its Application is restored to good standing, to resume its efforts. In this regard, it will work with the BLM, the Oregon Department of Fish and Wildlife, Malheur County and local property owners.⁵

⁵ The public officials that United have worked with are Susie Manezes (Bureau of Land Management, 514-473-6249), Philip Milburn (Oregon Department of Fish and Wildlife, 541-889-6975), and Jon Beal (Malheur County Planning Department (541-473-5185)).

Given more time, United is hopeful that it can persuade the governmental and private parties to work with it and, thereby, secure grant of its Application. Taking into consideration the relevant facts and record presented, United once again believes that it would be arbitrary and capricious, and in violation of precedent, for the Commission to dismiss the Application. Instead, the Commission should retain the Application in good standing and work with United as United seeks to achieve the necessary understandings with public and private entities and individuals and complete environmental review requirements.

WHEREFORE, United Booking Associates, Inc. respectfully requests that the Commission reverse the Media Bureau's decision dismissing United's Application for a construction permit for a new FM Station at Vale, Oregon and grant United more time to resolve the environmental issues surrounding its efforts to construct the Station.

Respectfully submitted,

UNITED BOOKING ASSOCIATES, INC.

By: _____/s/_____
Barry A. Friedman
Thompson Hine LLP
1919 N Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 331-8800

Dated: August 22, 2012

EXHIBIT A



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

VALE DISTRICT

100 Oregon Street

Vale, Oregon 97918

<http://www.or.blm.gov/Vale/>



IN REPLY REFER TO:

2860-01

AUG 16 2006

Mr. James McNeil
United Booking Associates, Inc.
Suite 200
466 South 400 East
Salt Lake City, Utah 84111

Dear Mr. McNeil:

We are writing in response to the communications you and your consultant, Kevin Terry, have made to the Vale, Oregon Office of the Bureau of Land Management, as well as the recent site visit by you and Mr. Terry, during which I and my colleagues viewed portions of the BLM managed property in Eastern Oregon with you.

As you have described it, your company, United Booking Associates, Inc., has won, in a Federal Communications Commission auction, the right to construct a new FM radio station that will serve Vale and its environs. The next step in the process, according to you, is for your company to locate a site on BLM managed lands, where you will install your transmitter building and tower and place your antenna on the tower.

We have advised you that electromagnetic sites, which encompass radio station transmitter sites, are within BLM's mandate to authorize. However, that mandate, covering BLM's role as the steward of federal lands, covers many and varied uses. In making any decision as to what land uses to permit, we must evaluate our management plans, and our mission of serving our many constituents, including ranchers, the general public, and our existing users.

You have provided us with the attached "areas to locate" map. The map shows the portions of BLM-managed lands in Eastern Oregon where you believe that your electromagnetic site must be located in order to comply with the requirements imposed upon your company by the FCC. These sites all appear to be at upper elevations distant from public roads and existing power lines, which, because of our mandate, are problematic at best for your stated purposes. The sites noted include Grassy Mountain, Freezout Ridge, and Cottonwood Mountain.

My staff has given your plans substantial consideration in the hope that we could provide assistance to you. We must report, however, that after our review we are unable to locate any BLM-managed lands, within your areas to locate, that fit within the criteria we have for high-power electromagnetic sites. Thus, we do not believe that we would be in a position to act favorably upon any formal right-of-way application you might submit.

The sites you have proposed at Grassy Mountain and Freezeout Ridge require the existing power line near Owyhee Reservoir be extended several miles or power be generated on-site. Previously, other parties have proposed to extend this power line to cabins along the reservoir itself. However, due to detrimental impacts such an extension would have on the fragile Owyhee Basin region, these proposals have been declined. It is reasonable to expect a similar determination on your proposal to extend the power line to either of these sites. With regard to generating power on-site, the roads to the site become inaccessible during the spring and winter months due to snow and mud. Therefore, fuel storage tanks of significant size would be installed at the proposed site. The BLM does not generally look favorably upon large fuel stores such as this in otherwise pristine areas due to the increased risk of ground water contamination and the impact that frequent fuel deliveries to the site would have on existing roads as well as nearby wildlife and habitat.

Your proposed site at Cottonwood Mountain currently serves as a low-power communications site and is powered by solar energy. Currently, the BLM has no plans to increase the power cap at the site as such an increase could interfere with existing site users. Furthermore, the BLM does not anticipate installation of power lines to the site because of environmental impacts that would ensue. On-site power generation, for the same reasons stated above, would also be problematic at this site because of accessibility and fuel storage concerns.

You also asked for our response as to what consideration we would give were you to be able to locate a private in-holding within the BLM-managed lands in Eastern Oregon for the construction of your proposed facilities. Even if you were able to satisfy local land use concerns and the private lands did not come with covenants that the BLM has negotiated with the in-holders, we must advise you that the BLM would not look favorably upon any formal right-of-way application to create new roads or build electric distribution facilities to a site you might select. Those facilities, especially to serve an in-holder site, are not uses we support.

The BLM does strongly support users co-locating on existing communications sites. The nearest existing site to your proposed area to co-locate would be at the Owyhee Ridge Communications Site to the east of Owyhee Dam. This site was designated a few years ago after another radio station approached our office with nearly an identical proposal. After an exhaustive search of possible communications sites on BLM land, we were finally able to identify a site to the east of Owyhee Reservoir which would meet the radio station's needs while minimizing environmental impacts on the Owyhee Basin. We would encourage your company to further examine this site to see if it meets your needs. The communications site plan for Owyhee Ridge encourages co-location and where there is ample room for co-location to occur at this site, we would have to deny your request to build a new site in the Grassy Mountain area. Our lease information on the Owyhee Ridge site indicate that the tower and building is owned by Bustos Media located in Sacramento, California.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

Because this is a decision to deny your application to build a new communications site on BLM, if you wish to file a petition (pursuant to regulations 43 CFR 4.21(58 FR 4939, January 19, 1993) or 43 CFR 2804.1 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in the decision and to the Interior Board of Land Appeals, and to the appropriate office of the Solicitor(see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

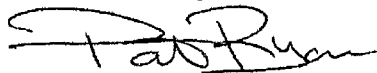
Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

1. The relative harm to the parties if the stay is granted or denied,
2. The likelihood of the appellant's success on the merits,
3. The likelihood of immediate and irreparable harm if the stay is not granted,
and
4. Whether the public interest favors granting the stay.

We appreciate the time and effort you have expended in connection with your request and wish you well with your plans. Should you have further questions, please contact our Vale District Realty Specialist, Susie Manezes at (541)-473-6249.

Sincerely,



Pat Ryan
Malheur Field Office Manager

Enclosures (as stated)

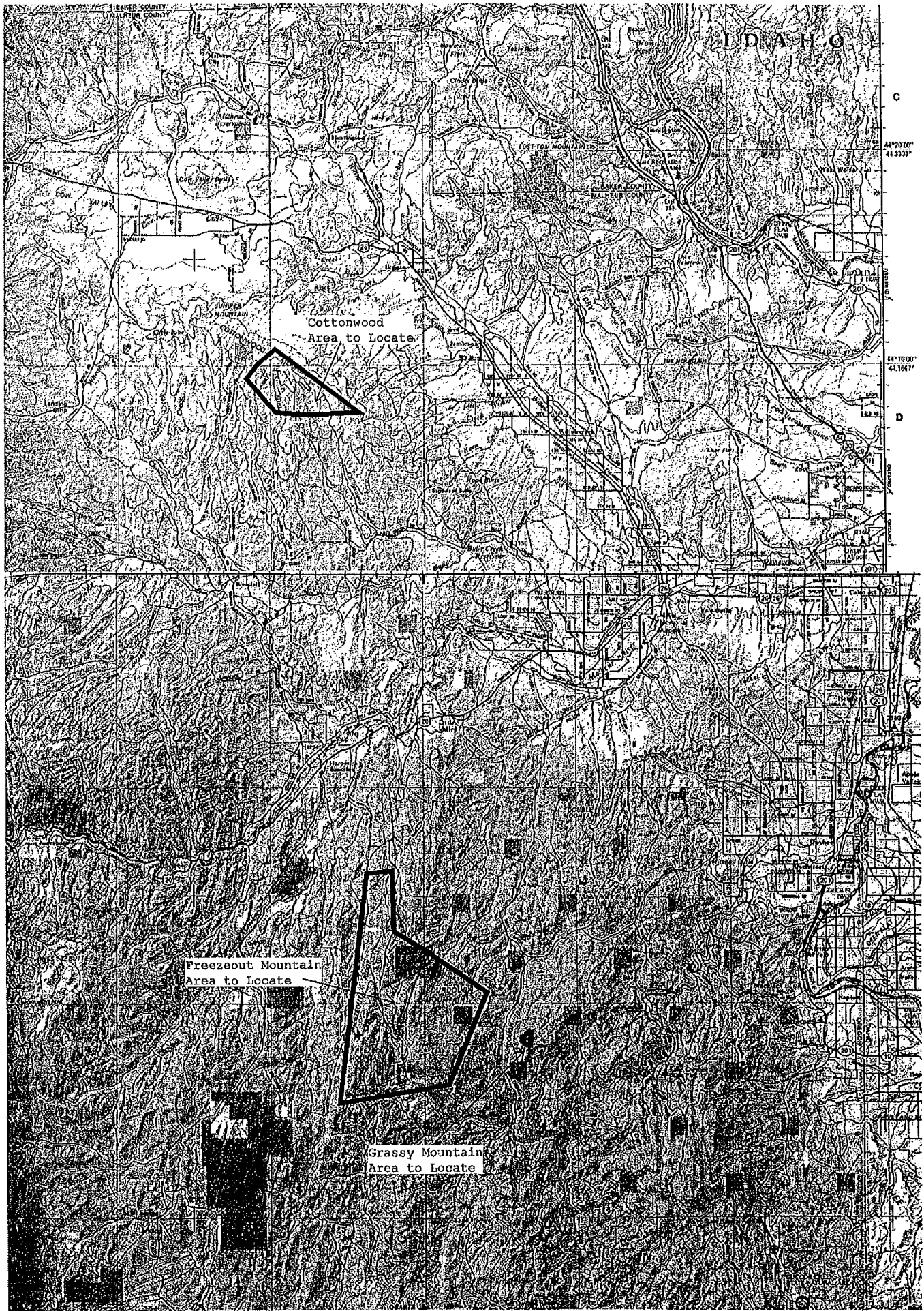


EXHIBIT B

Statement

I have prepared the instant Statement to inform the FCC of the challenges that United Booking Associates, Inc. ("UBAI"), has incurred thus far in attempting to secure a site to construct the Class C FM at Vale, OR, assigned FCC Facility ID #166084 (the "Vale FM").

UBAI started looking for tower sites at Grassy Mountain and Freezeout Mountain to the south of Vale (see Exhibit 1) in June 2006 when I met with Suzy Menezes of the BLM to inspect potential sites and evaluate viability. Upon visiting the site with BLM, Ms. Menezes informed us that the proposed site would be in the Owyhee Watershed and view shed. This area is considered of critical environmental concern and, therefore, we searched elsewhere. On August 16, 2006, the BLM sent a letter officially turning down our request to utilize any of the existing communications sites in our area to locate as they were designated low power (see Exhibit 2). They also informed us that the chances of receiving BLM easements in the area were also remote. They recommended that UBAI attempt to co-locate at an existing high-power designated tower site used by KQTA(FM). Unfortunately, our station is precluded from using this site due to FCC spacings concerns.¹

In the Fall of 2006, UBAI approached Bill Glenn to locate a tower on his land on the side of Cottonwood Mountain. At that location, a 500' tower would be required. UBAI filed for FAA permission on the site in 2006-ANM-4090-OE (See Exhibit 3). Mr. Glenn agreed to the proposal. Since there were no other towers at the proposed site, an environmental assessment would be required. We had initially thought that we would be able to bring power up to the site from the northeast (see Exhibit 4). Gary Davis, the representative from the local utility, indicated that the terrain to the northeast of the proposed tower site toward the existing power line was too rugged to safely construct and maintain a power line after he had rolled his ATV while inspecting the proposed route. He indicated we would need to look at bringing power up from the south (see Exhibit 5). By this time, it was too late in the year to continue accessing the land due to snowfall so the project was put on hold until spring. In May of 2007, we were able to access the Glenn Property to search for alternate power line routing options. The nearest power was over 13 miles away with several landowners in between the tower and existing power. Over the course of the next few months, it became apparent that UBAI would not succeed in retaining several easements for the power line. As such, the Glenn site possibility was abandoned.

In the Spring of 2007, we went back to the BLM requesting that they reconsider a

¹ At the KQTA(FM) site, the Vale FM would be shortspaced on Channel 288C0 under Section 73.207 and Section 73.215 to 2nd adjacent stations KJOT(FM) Boise, ID, and KCIX(FM) Garden City, ID. While KQTA(FM), itself, is also shortspaced by the same margin to KCIX(FM), it received a waiver of Section 73.215 in order to locate at this site due to otherwise lack of site availability.

tower on top of Cottonwood Mountain near, but not immediately adjacent to, the BLM's own solar powered communications site. This should overcome their objecting of mixing a high-power FM with current uses at their solar low-power designated site. UBAI proposed a site about a mile away from the existing site. Due to the amount of power that would be required by the Class C FM, solar was not an option. As such, we began exploring possible routes to bring the power line up the south side of Cottonwood Mountain. Suzie Menezes and Brandon Knapton of the BLM and Gary Davis from the local utility joined me in inspecting three possible routes over BLM land to bring power to such a site (see Exhibit 6). Unfortunately, BLM had significant concerns over the power line routes. This was due to the fact that the power line, on each of the three possible routes, would pass directly through or immediately adjacent to Sage Grouse mating areas called "leks". Due to the incredible amount of recent Natural Gas exploration being conducted in the Rocky Mountain West (namely in Wyoming and Colorado), the Sage Grouse population in the region had declined severely (like 80%) and the BLM had been instructed to protect all sage grouse habitat where there was not natural gas drilling operations "at all costs." The south side of Cottonwood Mountain was one of the areas that the Fish and Wildlife biologists had deemed priority one in protecting the sage grouse. Consequently, the BLM would not allow a power line to be constructed on the south side of Cottonwood Mountain.

At the same time we were working with the BLM, we also approached Bill Heid who owned land on the northeast side of Cottonwood Mountain (just to the east of the existing BLM communications site). Although power was on Mr. Heid's land, it was 9 miles from the tower site and there was a section of BLM land that the line would need to pass through (see Exhibit 7). The BLM indicated that this small section of land on the north side of Cottonwood was not an environmentally sensitive area and that it would not object to a power line in that area. We, therefore, on September 6, 2007, filed an amendment to BNPH-20060307BCW to proposed the facility on the Heid land. We also contacted the local utility, Idaho Power, to plan the power line route. One of Idaho Power's requirements was that a survey and legal description must be completed prior to any construction being able to occur. We contracted with Compass Land Surveyors out of Nampa, ID, to complete this phase of work. Upon visiting the proposed power line route, the surveyors were unable to locate any survey markers before the snow began falling in late 2007. So, the survey work was postponed until Spring.

In the Spring of 2008, the surveyors still could locate no markers. The last time this area had been surveyed was in the 1800s and Compass was convinced that, like many surveys conducted in eastern Oregon at that time, the surveyors from long ago did their survey work "from the tent." Several surveyors contracted by the federal government to survey this area of Oregon in the 1800s fraudulently submitted survey notes that were completely fabricated. In other words, no surveyor actually walked the land and placed markers. Instead, the surveyors, thinking that no one would ever catch them until long after they were dead, simply wrote descriptions on paper and fabricated the survey in order to get paid. There are several townships in Eastern Oregon where

this occurred. And, the Heid and BLM Properties were in such a township. Without a survey, there was not going to be a power line. And, Compass Land Surveyors informed us that the possibility of being able to create a survey for the entire 36 square mile township was remote and could significantly change property boundaries that had been "guessed" by landowners long ago. Changing those boundaries now could open a can of worms and force landowners to change fence lines – all of which would be very unpopular with the neighbors. Therefore, we had to look for another site outside the fraudulently surveyed township and moved our site search further west.

In the summer of 2008, we were able to get an agreement with Bud Munsterman to place a tower on his land. There were four landowners that UBAI would need to negotiate power line easements with and they all agreed (see Exhibit 8). Therefore, UBAI amended the FCC application on July 1, 2008, to propose the facility on the Munsterman land. Since the tower was going to require an environmental assessment, we contracted with Sagebrush Consulting and Bio-West, Inc., for that work. UBAI also filed for our Special Use Permit with Malheur County (see Exhibit 9). As a result of seeking a Special Use Permit, the Oregon Department of Fish and Wildlife expressed an objection to the proposed project. Representatives of Bio-West and I worked with Larry Milburn of the ODFW to address each of that agency's concerns (see Exhibit 10).

In the summer of 2008, UBAI also started surveying a new power line route coming to the top of Cottonwood Mountain from the north/northwest. The route would pass through two different townships from north to south. Over the course of the summer/fall of 2008, Compass was able to reliably locate survey markers in only the southern township. The northern township, where few survey markers were found, was also thought by Compass to have been fraudulently surveyed in the 1800s (see Exhibit 11). Snowfall required Compass to cease survey work late in the fall of 2008. In the April of 2009, Compass sent an email that indicated that the survey in the problematic township may not have been fraudulent – only done incorrectly by the original surveyor back in the 1800s (see Exhibit 12). Compass seemed confident that they would be able to reinvent the wheel, if you will, and now be able to find the markers. Unfortunately, Compass had made such statements before but they were not willing to complete the remaining work for a pre-determined price. They required payment for the hours they would have to put in without knowing exactly how many hours would be required. As disconcerting that the prospect of paying a surveyor and unknown amount of money was to handle, even more problematic was the fact that one of the four landowners which the power line needed to pass (the Smith land) had been forced to sell its land due to the economic downturn and UBAI did not have an agreement with the new landowner when I was directed to stop working on the project.

At this point, it appears that bringing power to the site might be possible if the new landowner (and old landowners) have an interest in granting the easements and if Compass, in fact, can actually complete an easement survey in the questionable township. Otherwise, generator power will be the only way to serve the site.

Unfortunately, in order to bring fuel to the site for the generators, BLM roads will have to be significantly improved so fuel trucks can come up the south side of Cottonwood Mountain through the Sage Grouse Leks. Since there are established BLM roads that are open to the public through this area, we initially thought that we would be able bring fuel to the site that way. The BLM, however, has indicated that fuel deliveries are not a designated purpose for those roads. Large fuel storage tanks would be needed at the site since it is inaccessible for much of the year and the BLM has indicated that it "does not generally look favorably upon large fuel stores such as this in otherwise pristine areas due to the increased risk of ground water contamination and the impact that frequent fuel deliveries to the site would have on existing roads as well as nearby wildlife and habitat" (see Exhibit 2). To the best of my knowledge, this work has not been completed so I do not know if this will be an option or not.

Another option is to receive a waiver to Section 73.207 (as KQTA received) so that we can co-locate the Vale FM on that tower. However, based on the resistance that KQTA(FM) Homedale received in getting such a waiver even though their site acquisition process was almost identical to ours, a waiver for the Vail FM may be an uphill battle.

In conclusion, UBAI has been unable to locate a site where a new Class C FM can serve Vale, Oregon, and its environs. Although Cottonwood Mountain is the most ideal location, it is becoming clear that such usage may be precluded by a variety of factors beyond UBAI's control in this area and UBAI may be required to search elsewhere for a site.

This Statement is made this 9th day of March 2011.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Terry", written over a horizontal line.

Kevin Terry
Technical Consultant